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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/715,430	11/19/2003	Michael K. McNerney	COE-566	5350

30046 7590 09/05/2007
HUMPHREYS ENGINEER CENTER SUPPORT ACTIVITY
ATTN: CEHEC-OC
7701 TELEGRAPH ROAD
ALEXANDRIA, VA 22315-3860

EXAMINER

SPAHN, GAY

ART UNIT	PAPER NUMBER
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3635

MAIL DATE	DELIVERY MODE
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09/05/2007

PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

<p align="center">Advisory Action Before the Filing of an Appeal Brief</p>	Application No. 10/715,430	Applicant(s) MCINERNEY ET AL.	
	Examiner Gay Ann Spahn	Art Unit 3635	

--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

THE REPLY FILED 24 August 2007 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE.

1. ☒ The reply was filed after a final rejection, but prior to or on the same day as filing a Notice of Appeal. To avoid abandonment of this application, applicant must timely file one of the following replies: (1) an amendment, affidavit, or other evidence, which places the application in condition for allowance; (2) a Notice of Appeal (with appeal fee) in compliance with 37 CFR 41.31; or (3) a Request for Continued Examination (RCE) in compliance with 37 CFR 1.114. The reply must be filed within one of the following time periods:

- a) ☒ The period for reply expires 3 months from the mailing date of the final rejection.
 b) ☐ The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection.

Examiner Note: If box 1 is checked, check either box (a) or (b). ONLY CHECK BOX (b) WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

NOTICE OF APPEAL

2. ☐ The Notice of Appeal was filed on _____. A brief in compliance with 37 CFR 41.37 must be filed within two months of the date of filing the Notice of Appeal (37 CFR 41.37(a)), or any extension thereof (37 CFR 41.37(e)), to avoid dismissal of the appeal. Since a Notice of Appeal has been filed, any reply must be filed within the time period set forth in 37 CFR 41.37(a).

AMENDMENTS

3. ☒ The proposed amendment(s) filed after a final rejection, but prior to the date of filing a brief, will not be entered because
 (a) ☒ They raise new issues that would require further consideration and/or search (see NOTE below);
 (b) ☒ They raise the issue of new matter (see NOTE below);
 (c) ☒ They are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or
 (d) ☐ They present additional claims without canceling a corresponding number of finally rejected claims.

NOTE: See Continuation Sheet. (See 37 CFR 1.116 and 41.33(a)).

4. ☒ The amendments are not in compliance with 37 CFR 1.121. See attached Notice of Non-Compliant Amendment (PTOL-324).
 5. ☐ Applicant's reply has overcome the following rejection(s): _____.
 6. ☐ Newly proposed or amended claim(s) _____ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).
 7. ☒ For purposes of appeal, the proposed amendment(s): a) ☒ will not be entered, or b) ☐ will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.
 The status of the claim(s) is (or will be) as follows:
 Claim(s) allowed: _____.
 Claim(s) objected to: _____.
 Claim(s) rejected: 1-3, 5-9 and 12.
 Claim(s) withdrawn from consideration: 10, 11, and 13-35.

AFFIDAVIT OR OTHER EVIDENCE

8. ☐ The affidavit or other evidence filed after a final action, but before or on the date of filing a Notice of Appeal will not be entered because applicant failed to provide a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented. See 37 CFR 1.116(e).
 9. ☐ The affidavit or other evidence filed after the date of filing a Notice of Appeal, but prior to the date of filing a brief, will not be entered because the affidavit or other evidence failed to overcome all rejections under appeal and/or appellant fails to provide a showing a good and sufficient reasons why it is necessary and was not earlier presented. See 37 CFR 41.33(d)(1).
 10. ☐ The affidavit or other evidence is entered: An explanation of the status of the claims after entry is below or attached.

REQUEST FOR RECONSIDERATION/OTHER

11. ☒ The request for reconsideration has been considered but does NOT place the application in condition for allowance because:
See Continuation Sheet.
 12. ☐ Note the attached Information Disclosure Statement(s). (PTO/SB/08) Paper No(s). _____.
 13. ☐ Other: _____.

CONTINUATION SHEET (PTO-303)

Continuation of 3. NOTE:

With respect to Box 3(a) above, the examiner notes that the amendments to independent claim 1, namely, that the first layer of concrete is placed "upon said earthen surface", that the panels are "reinforcing" panels which would "serve to reinforce the concrete-surfaced flooring", and that "said barrier prevents said fluid flow from said earthen surface upward through said second layer of concrete", would require further consideration and/or search.

With respect to Box 3(b) above, the examiner notes that Applicants have not pointed out where there is support for the amendments to claim 1 and that the recitation of "wherein said panels serve to reinforce said concrete-surfaced flooring" appears to constitute new matter since the only "reinforcing" language that the examiner could find in the specification is on page 5, lines 19-20 wherein it refers to "a continuous sheet of metal foil that also serves to reinforce an underlayment, such as a concrete slab." Thus, there appears to be no support for the panel reinforcing the concrete-surfaced flooring, only that the panel reinforces the underlayment or concrete slab beneath the panel.

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Continuation of 11. does NOT place the application in condition for allowance

because:

First, in response to applicant's argument on page 11, lines 3-14, of their "Amendment Under 35 USC § 113 [sic - 37 C.F.R. § 1.116] filed on 24 August 2007, based upon the age (i.e., 58 year span between references) of the DAHLANDER and BORLAND references, the examiner notes that contentions that the reference patents are old (or a long space of time between references) are not impressive absent a showing that the art tried and failed to solve the same problem notwithstanding its presumed knowledge of the references. See *In re Wright*, 569 F.2d 1124, 193 USPQ 332 (CCPA 1977).

Second, in response to applicant's argument on page 11, line 14 through page 12, line 10, of their "Amendment Under 35 USC § 113 [sic - 37 C.F.R. § 1.116] filed on 24 August 2007, Applicants appear to be arguing the merits of the newly added subject matter to claim 1 and since the "Amendment Under 35 USC § 113 [sic - 37 C.F.R. § 1.116] filed on 24 August 2007" has not been entered, these arguments are moot and will not be addressed here.

Third, on page 12, lines 19-20, of their "Amendment Under 35 USC § 113 [sic - 37 C.F.R. § 1.116] filed on 24 August 2007, Applicants state that "Claim 2 is not mentioned above as one of the claims being rejected." This is absolutely wrong as the examiner clearly put "CLAIMS 1-3 ..." not "Claims 1, 3, ..." as misquoted by Applicants on page 8, line 15 of their "Amendment Under 35 USC § 113 [sic - 37 C.F.R. § 1.116] filed on 24 August 2007".

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Finally, Applicants' arguments with respect to dependent claims 2, 3, 5-9, and 12 appear to be based mainly upon the merits of the newly added claim language in the amendments to claim 1 and as stated above since the amendments to the claims have not been entered by the examiner, these arguments are moot and will not be addressed here.

Conclusion

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Gay Ann Spahn whose telephone number is (571)-272-7731. The examiner can normally be reached on Monday through Friday, 10:30 am to 7:00 pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Richard E. Chilcot can be reached on (571)-272-6777. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic

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Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

^{CAS}
Gay Ann Spahn, Patent Examiner
August 30, 2007


RICHARD E. CHILCOTE, JR.
SUPERVISORY PATENT EXAMINER

**Notice of Non-Compliant
Amendment (37 CFR 1.121)**

Application No.

10/715,430

Examiner

Gay Ann Spahn

Applicant(s)

MCINERNEY ET AL.

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

The amendment document filed on 24 August 2007 is considered non-compliant because it has failed to meet the requirements of 37 CFR 1.121 or 1.4. In order for the amendment document to be compliant, correction of the following item(s) is required.

THE FOLLOWING MARKED (X) ITEM(S) CAUSE THE AMENDMENT DOCUMENT TO BE NON-COMPLIANT:

- ☐ 1. Amendments to the specification:
- ☐ A. Amended paragraph(s) do not include markings.
 - ☐ B. New paragraph(s) should not be underlined.
 - ☐ C. Other _____.
- ☐ 2. Abstract:
- ☐ A. Not presented on a separate sheet. 37 CFR 1.72.
 - ☐ B. Other _____.
- ☐ 3. Amendments to the drawings:
- ☐ A. The drawings are not properly identified in the top margin as "Replacement Sheet," "New Sheet," or "Annotated Sheet" as required by 37 CFR 1.121(d).
 - ☐ B. The practice of submitting proposed drawing correction has been eliminated. Replacement drawings showing amended figures, without markings, in compliance with 37 CFR 1.84 are required.
 - ☐ C. Other _____.
- ☒ 4. Amendments to the claims:
- ☐ A. A complete listing of all of the claims is not present.
 - ☐ B. The listing of claims does not include the text of all pending claims (including withdrawn claims)
 - ☒ C. Each claim has not been provided with the proper status identifier, and as such, the individual status of each claim cannot be identified. Note: the status of every claim must be indicated after its claim number by using one of the following status identifiers: (Original), (Currently amended), (Canceled), (Previously presented), (New), (Not entered), (Withdrawn) and (Withdrawn-currently amended).
 - ☐ D. The claims of this amendment paper have not been presented in ascending numerical order.
 - ☒ E. Other: See Continuation Sheet.
- ☐ 5. Other (e.g., the amendment is unsigned or not signed in accordance with 37 CFR 1.4):

For further explanation of the amendment format required by 37 CFR 1.121, see MPEP § 714.

TIME PERIODS FOR FILING A REPLY TO THIS NOTICE:

1. Applicant is given **no new time period** if the non-compliant amendment is an after-final amendment or an amendment filed after allowance. If applicant wishes to resubmit the non-compliant after-final amendment with corrections, the **entire corrected amendment** must be resubmitted.
2. Applicant is given **one month**, or thirty (30) days, whichever is longer, from the mail date of this notice to supply the correction, if the non-compliant amendment is one of the following: a preliminary amendment, a non-final amendment (including a submission for a request for continued examination (RCE) under 37 CFR 1.114), a supplemental amendment filed within a suspension period under 37 CFR 1.103(a) or (c), and an amendment filed in response to a *Quayle* action. If any of above boxes 1. to 4. are checked, the correction required is only the **corrected section** of the non-compliant amendment in compliance with 37 CFR 1.121.

Extensions of time are available under 37 CFR 1.136(a) only if the non-compliant amendment is a non-final amendment or an amendment filed in response to a *Quayle* action.

Failure to timely respond to this notice will result in:

Abandonment of the application if the non-compliant amendment is a non-final amendment or an amendment filed in response to a *Quayle* action; or

Non-entry of the amendment if the non-compliant amendment is a preliminary amendment or supplemental amendment.

Legal Instruments Examiner (LIE), if applicable

Telephone No.

Continuation of 4(e) Other:

With respect to Box 4A above, the examiner notes that Applicants have given claim 10 the status identifier of "(Previously Presented)" and this status identifier is incorrect. The proper status identifier is "(Withdrawn)" as in the first Office Action mailed on 20 October 2005, page 3, the third full paragraph, the examiner withdrew claim 10 from consideration as being drawn to a nonelected species and every Office Action Summary (i.e., PTOL-326) thereafter has listed claim 10 as withdrawn.

Further, Applicants have given claims 2, 6, 7, and 9 the status identifier of "(Previously Presented)" and have given claims 3, 5, and 12 the status identifier of "(Previously Amended)". The examiner does not understand if Applicants are trying to make some distinction between the claims that are listed as "(Previously Presented)" and the claims that are listed as "(Previously Amended)". Although the Manual of Patent Examining Procedure (MPEP), section 714, allows for the status identifier of "(Previously Amended)" as an acceptable alternative to "(Previously Presented)," the variations of the status identifier are only acceptable if "the status of the claims is accurate and clear." Since it is confusing to have both of the status identifiers of "(Previously Presented)" and "(Previously Amended)" in a single amendment as making it unclear if there is a distinction in the status of the claims having "(Previously Presented)" from those having "(Previously Amended)", the examiner believes the present amendment to be non-compliant.

^{GAS}
Gay Ann Spahn, Patent Examiner
August 30, 2007


RICHARD E. CHILCOTT, JR.
SUPERVISORY PATENT EXAMINER